A

TRUSJADI HOLDINGS SDN BHD v. WARIS SELESA SDN BHD (IN LIQUIDATION)

COURT OF APPEAL, PUTRAJAYA
ABDUL RAHMAN SEBLI JCA
KAMARDIN HASHIM JCA
B HARMINDAR SINGH DHALIWAL JCA
[CIVIL APPEAL NO: S(02)(NCVC)(W)-1137-6-2016]
11 OCTOBER 2018

C ***LIMITATION:*** *Contract – Sale and purchase of land – Claim for specific performance of sale and purchase agreement – Whether defence of limitation must be specifically pleaded – Whether defence had been set up pursuant to proviso to s. 3 of Limitation Ordinance (Sabah Cap 72) – Whether sufficient to aver intention to rely on limitation in statement of defence – Whether limitation set in – Limitation Ordinance (Sabah Cap 72), Schedule, items 92 & 95*

D This appeal arose from two consolidated suits. In Suit 86, the respondent claimed against the appellant: (i) that the sale and purchase agreement dated 19 February 2004 ('the SPA') in respect of the property ('the land') was valid and enforceable between the parties; (ii) that the appellant was holding the land as bare trustee pending transfer of the land to the respondent; and E (iii) the respondent was the legal and beneficial owner of the land. Whereas, the respondent's claim in Suit 113 was for a declaration that the sublease agreement dated 5 July 2005 between the appellant and the respondent in respect of the land was null and void. The appellant was the majority shareholder of the respondent, which had been wound up and a liquidator F had been appointed for the respondent. Pursuant to the SPA, the appellant agreed to sell the land to the respondent. A sublease for a period of 70 years was created in favour of the respondent on the land and registered under Memo No 30319575. The appellant, in its statement of defence in Suit 86, pleaded that the respondent's claim to enforce the SPA was barred by item G 95 of the Schedule to Limitation Ordinance (Sabah Cap 72) ('Ordinance'). Further, in its opening statement, the appellant relied on item 92 of the Schedule which provides that, for specific performance of a contract, the limitation period is three years from the date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that the performance is refused. The trial judge held that limitation had not set in against the H respondent and took the view that the applicable item was item 112 and not item 95 of the Schedule. At the conclusion of the trial, the trial judge allowed the respondent's claims. Hence, this appeal.

I

Held (allowing appeal with costs)
Per Abdul Rahman Sebli JCA delivering the judgment of the court:

(1) The Ordinance did not contain any provision that was even close to item 112 of the Schedule to the Ordinance. Item 112 was only applicable to a claim for adverse possession. The respondent's claim in Suit 86 was not for adverse possession, rather, it was for the breach of SPA and/or specific performance of the agreement. The claim was thus outside the scope of item 112 and hence, the trial judge's reliance on item 112 was misconceived. (paras 20 & 22)

(2) The appellant had put the respondent to sufficient notice of its intention to rely on limitation by pleading item 95 in its statement of defence and by relying on item 92 in its opening statement, and it had not, at any stage of the hearing, abandoned the defence. The limitation period for specific performance was clearly an issue before the High Court and the respondent had every opportunity to adduce evidence to defeat the defence but chose not to do so. Thus, while item 92 was not pleaded by the appellant in Suit 86, the failure did not disentitle it from relying on the item as it was clear on the agreed facts that the respondent's claim was for breach of contract and/or for specific performance, and not for adverse possession of the land. Facts that were agreed upon had the same value and weight as the facts that were proved after a full trial. (paras 30-32)

(3) What was mandatorily required by the proviso to s. 3 of the Ordinance is for the defence of limitation to be set up by the appellant if he intends to rely on it, which the appellant had done in the present case. The proviso does not say that the appellant must plead the particular item or items of the schedule that he intends to rely on. So long as the defence of limitation had been set up as required by the proviso to s. 3 of the Ordinance, and the appellant's reliance on any item of the Schedule was supported by evidence, the court was under a duty to consider the defence although not pleaded. It was sufficient for the appellant to aver in the defence that the respondent's claim was time-barred according to law (*Syarikat Kemajuan Timbermine*). (paras 36-38)

(4) By virtue of item 92 of the Schedule, the three-year limitation period for the respondent to claim for specific performance of the SPA began to run from 4 February 2005, which was the date when the appellant allegedly breached the SPA by failing to transfer the land to the respondent as agreed. By the time the respondent filed Suit 86 and Suit 113 in October 2015, it was clearly out of time. Its claims should therefore have been dismissed by the trial judge by virtue of s. 3 of the Ordinance. (paras 40 & 41)

A ***Bahasa Malaysia*** *Headnotes*

Rayuan ini berbangkit daripada dua guaman yang digabungkan. Dalam Guaman 86, responden menuntut terhadap perayu: (i) bahawa perjanjian jual beli bertarikh 19 Februari 2004 ('PJB') berkaitan dengan hartanah tersebut ('tanah') adalah sah dan berkuat kuasa antara pihak-pihak; (ii) bahawa perayu
B memegang tanah tersebut sebagai pemegang amanah mudah sementara tanah tersebut dipindah milik kepada responden; dan (iii) responden adalah pemilik sah dan benefisial tanah. Manakala, tuntutan responden dalam Guaman 113 adalah untuk deklarasi bahawa perjanjian subpajakan bertarikh 5 Julai 2005 antara perayu dan responden berkaitan dengan tanah tersebut
C adalah terbatal dan tidak sah. Perayu adalah pemegang majoriti dalam responden, yang telah digulungkan dan seorang pelikuidasi dilantik untuk responden. Menurut PJB, perayu bersetuju menjual tanah tersebut kepada responden. Satu subpajakan untuk tempoh 70 tahun dibentuk berpihak pada responden atas tanah itu dan didaftarkan bawah Memo No 30319575.
D Perayu, dalam pernyataan pembelaan dalam Guaman 86 memplidkan bahawa tuntutan responden untuk menguatkuasakan PJB dihalang oleh item 95 Jadual kepada Ordinan Had Masa (Sabah Cap 72) ('Ordinan'). Selanjutnya, dalam hujahan pembukaannya, perayu bersandar pada item 92 Jadual yang memperuntukkan bahawa, untuk pelaksanaan spesifik kontrak,
E tempoh had masa adalah tiga tahun dari tarikh yang ditetapkan untuk pelaksanaan, atau, jika tiada tarikh ditetapkan, apabila plaintif mempunyai notis bahawa pelaksanaan dinafikan. Hakim bicara memutuskan bahawa had masa tidak terakru terhadap responden dan berpendapat item yang terpakai adalah item 112 dan bukan item 95 Jadual. Di akhir perbicaraan, hakim bicara membenarkan tuntutan-tuntutan responden. Oleh itu, rayuan ini.

F **Diputuskan (membenarkan rayuan dengan kos)**
Oleh Abdul Rahman Sebli HMR menyampaikan penghakiman mahkamah:

(1) Ordinan tersebut tidak mengandungi apa-apa peruntukan yang hampir
G dengan item 112 Jadual pada Ordinan. Item 112 hanya diguna pakai untuk tuntutan milikan bertentangan. Tuntutan responden dalam Guaman 86 bukan untuk milikan bertentangan, tetapi, untuk pelanggaran PJB dan/atau pelaksanaan spesifik perjanjian tersebut. Tuntutan tersebut, oleh itu, di luar skop item 112 dan dengan itu,
H sandaran hakim bicara pada item 112 satu salah tanggapan.

(2) Perayu telah memberi notis secukupnya kepada responden tentang niat untuk bersandar pada had masa dengan memplid item 95 dalam pernyataan pembelaan dan dengan bersandar pada item 92 dalam hujahan pembukaannya, dan tidak, pada mana-mana peringkat
I perbicaraan, menggugurkan pembelaan tersebut. Tempoh had masa

untuk pelaksanaan spesifik jelas satu isu di Mahkamah Tinggi dan responden mempunyai setiap peluang untuk mengemukakan keterangan mematahkan pembelaan tersebut tetapi memilih untuk tidak berbuat demikian. Oleh itu, walaupun item 92 tidak diplidkan oleh perayu dalam Guaman 86, kegagalan itu tidak menafikannya daripada bersandar atas item tersebut kerana ini jelas atas fakta-fakta yang dipersetujui bahawa tuntutan responden adalah untuk pelanggaran kontrak dan/atau pelaksanaan spesifik, dan bukan milikan bertentangan tanah tersebut. Fakta yang disetujui mempunyai nilai dan berat yang sama dengan fakta yang dibuktikan selepas perbicaraan penuh.

(3) Yang diperlukan secara mandatori oleh proviso kepada s. 3 Ordinan adalah agar pembelaan had masa dikemukakan oleh perayu jika hendak bersandar padanya, seperti yang dibuat perayu dalam kes ini. Proviso tersebut tidak menyatakan bahawa perayu mesti memplid item tertentu atau item-item dalam Jadual yang hendak disandarnya. Asalkan pembelaan had masa dikemukakan seperti yang diperlukan oleh proviso kepada s. 3 Ordinan, dan sandaran perayu atas mana-mana item dalam Jadual disokong keterangan, mahkamah bertanggungjawab untuk mempertimbangkan pembelaan itu, walaupun tidak diplidkan. Mencukupi buat perayu menyatakan dalam pembelaannya bahawa tuntutan responden terhalang oleh had masa menurut undang-undang (*Syarikat Kemajuan Timbermine*).

(4) Melalui item 93 Jadual, tempoh had masa tiga tahun untuk responden menuntut pelaksanaan spesifik PJB bermula dari 4 Februari 2005, yang adalah tarikh apabila perayu dikatakan melanggar PJB dengan gagal memindah milik tanah kepada responden seperti yang disetujui. Sebelum responden memfailkan Guaman 86 dan Guaman 113 pada Oktober 2015, ini jelas di luar had masa. Tuntutannya, oleh itu, sepatutnya ditolak oleh hakim bicara menurut s. 3 Ordinan.

Case(s) referred to:

Hj Hussin Hj Ali & Ors v. Datuk Hj Mohamed Yaacob & Ors and Other Cases [1983] 2 CLJ 68; [1983] CLJ (Rep) 165 FC ***(refd)***

Muhamad Solleh Saarani & Anor v. Norruhadi Omar & Ors [2010] 1 LNS 370 HC ***(refd)***

Narinder Kaur v. Deyoh Opong & Ors [1997] 2 CLJ 895 HC ***(refd)***

Nasri v. Mesah [1970] 1 LNS 85 FC ***(refd)***

Ong Ah Bee v. Hii Chung Siong, Robin [1993] 1 CLJ 504 HC ***(refd)***

Syarikat Kemajuan Timbermine Sdn Bhd v. Kerajaan Negeri Kelantan Darul Naim [2015] 2 CLJ 1037 FC ***(refd)***

Legislation referred to:

Limitation Act 1953, s. 6(1)(a)

Limitation Ordinance (Sabah) (Cap 72), s. 3, Schedule items 92, 94, 95, 112

A *For the appellant - Victor Chong; M/s Poh & Victor Chong*
For the respondent - Chin Yuen Fong; M/s Chee & Co
For the intervener - Arthur Bonnie & Wilson Chang; M/s Tan, Arthur Bonnie & Partners

[Editor's note: Appeal from High Court, Kota Kinabalu; Suit No: BKI-22NCVC-113-10-2015 (overruled).]

B *Reported by S Barathi*

JUDGMENT

Abdul Rahman Sebli JCA:

C **[1]** We had, after hearing arguments by both sides, unanimously allowed the appellant's appeal and set aside the decision of the High Court on the ground that limitation had set in against the respondent. The appellant was the defendant and the respondent, the plaintiff at the trial. These are the full grounds of our decision.

D **[2]** This appeal arose from two consolidated suits. The first was Suit No. BKI-22NCVC-86-10-2014 ("Suit 86") whilst the second was Suit No. BKI-22NCVC-113-10-2015 ("Suit 113"). In Suit 86, the respondent's claim against the appellant was for the following reliefs:

(a) That the sale and purchase agreement dated 19 February 2004 ("the
E SPA") in respect of property held under Country Lease No. 245334570 measuring approximately 694.10 acres more or less located off KM37, Jalan Lahad Datu, Kunak, Tawau Sabah ("the subject land") was valid and enforceable between the parties, namely the appellant and the respondent.

F (b) That the appellant was holding the subject land as bare trustee pending transfer of the subject land to the respondent.

(c) The respondent was the legal and beneficial owner of the subject land.

[3] As for Suit 113, the respondent's claim was for a declaration that the
G sublease agreement dated 5 July 2005 entered into between the appellant and the respondent in respect of the subject land was null and void.

[4] The agreed facts in Suit 86 are as follows:

(i) The respondent was at all material times a company registered in
H Malaysia and having its registered office at Lot 17, MDLD 3282, Block 2, 1st Floor, Fajar Centre, Lahad Datu, Sabah, Malaysia.

(ii) The respondent was wound up pursuant to a winding-up order dated 13 June 2014 wherein one Dato' Chong Kwong Chin c/o Ismail Chong & Associates of No. 8A, Jalan Semantan Satu, Damansara Heights,
I Kuala Lumpur was appointed as the liquidator for the respondent.

(iii) The appellant was the majority shareholder of the respondent. A

(iv) Pursuant to the SPA, the appellant agreed to sell the subject land to the respondent.

(v) The salient terms and conditions of the SPA were, *inter alia*:

(a) the purchase price for the subject land was RM6,169,000. B

(b) the purchase price was to be paid in kind by using 6,169,000 of the respondent's shares of RM1 to the appellant.

(c) vacant possession of the land was to be delivered to the respondent upon payment of the purchase price of RM6,169,000. C

(d) the respondent through its advocate's letter dated 30 July 2014 wrote to the directors of the respondent to enquire about the transfer of the subject land.

(e) the directors of the respondent through Messrs Skrine duly responded to the respondent's advocate's aforesaid letter *vide* letter dated 2 September 2014. D

[5] With regard to Suit 113, these are the agreed facts:

(a) the respondent was at all material times a company registered in Malaysia and having its registered office at Lot 17, MDLD 3282, Block 2, 1st Floor, Fajar Centre, Lahad Datu, Sabah, Malaysia. E

(b) the respondent was wound up pursuant to a winding-up order dated 13 June 2014 wherein one Dato' Chong Kwong Chin c/o Ismail Chong & Associates of No. 8A, Jalan Semantan Satu, Damansara Heights, Kuala Lumpur was appointed as the liquidator for the respondent. F

(c) the appellant (first defendant in the High Court) was at all material times a company incorporated under the laws of Malaysia with its registered address at the Multi-Services (S) Sdn Bhd, Lot Nos. 224 & 225, 2nd Floor, Wisma Sabah, Kota Kinabalu, Sabah, Malaysia. G

(d) the appellant was at all material times the majority shareholder of the respondent holding 6,169,000 of the total of 6,269,000 shares of the respondent.

(e) on or around 19 February 2004, the respondent entered into the SPA with the appellant wherein the appellant agreed to sell the subject land for RM6,169,000 subject to other terms of the agreement. H

(f) a sub-lease for a period of 70 years with effect from 1 May 2004 to 30 April 2074 by the appellant in favour of the respondent was created on the subject land and registered under Memo No. 30319575 dated 5 July 2005. I

[6] At the conclusion of the trial, the learned trial judge allowed the respondent's claims, hence the present appeal by the appellant.

[7] One of the issues raised by the appellant in the court below and pursued before us was that the respondent's claim(s) was caught by limitation and should have been dismissed by the learned trial judge. Reliance was placed on s. 3 of the Limitation Ordinance Sabah Cap. 72 ("the Limitation Ordinance") which provides as follows:

> Subject to sections 4 to 24, every suit instituted after the period of limitation prescribed therefor by the Schedule shall be dismissed:
>
> Provided that limitation has been set up as a defence.

[8] The appellant had pleaded by para. 7 of its statement of defence in Suit 86 that the respondent's claim to enforce the SPA was barred by item 95 of the Schedule to the Limitation Ordinance. This item provides that for compensation for the breach of a contract in writing, the limitation period is six years from the period when the period of limitation would begin to run against a suit brought on a similar contract not in writing.

[9] The subject matter of the respondent's claim in Suit 86 was the SPA, which the respondent claimed was valid and enforceable, whereas the subject matter of the respondent's claim in Suit 113 was the lease agreement, which it claimed was null and void.

[10] For compensation for the breach of any contract, express or implied, not in writing and not specifically provided for in the Schedule, the limitation period prescribed by item 94 is three years, which runs from when the contract is broken, or, where there are successive breaches, when the breach in respect of which the suit is instituted occurs, or, where the breach is continuing, when it ceases.

[11] In its opening statement, the appellant had also relied on item 92 of the Schedule, which provides that for specific performance of a contract, the limitation period is three years from the date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that the performance is refused. In the present case, a date had been fixed for the performance of the SPA.

[12] The respondent did not file any statement of reply to the appellant's statement of defence in relation to the issue of limitation. In *Ong Ah Bee v. Hii Chung Siong, Robin* [1993] 1 CLJ 504, Steve Shim Lip Kiong J (as he then was) had this is to say on the defence of limitation:

Now it has been held that when the defence of limitation is raised, the burden of pleading and proving that the action was brought within the limitation period shifts to the plaintiff. In *Cartledge v. E. Jopling & Sons Ltd.* [1963] 1 All ER 341, Lord Pearce said:

> I agree that when a defendant raises the statute of limitation the initial onus is on the plaintiff to prove that his cause of action occurred within the statutory period. When, however, a plaintiff has proved an accrual of damage within the six years … the burden passes to the defendants to show that the apparent accrual of a cause of action is misleading and that in reality the cause of action accrued at an earlier date.'

[13] Despite being faced with the defence of limitation set up by the appellant, the respondent did not plead why its action was not caught by limitation, nor did it lead any evidence to show how it could escape from the defence of limitation.

[14] In *Hj Hussin Hj Ali & Ors v. Datuk Hj Mohamed Yaacob & Ors and Other Cases* [1983] 2 CLJ 68; [1983] CLJ (Rep) 165; [1983] 2 MLJ 227, the Federal Court held that where it was clear that the defendants were going to rely on limitation and there was nothing before the court to suggest that the plaintiff could escape from it, the claim would be struck out.

[15] In *Muhamad Solleh Saarani & Anor v. Norruhadi Omar & Ors* [2010] 1 LNS 370; [2010] 9 MLJ 603, VT Singham J in dealing with s. 6(1)(a) of the West Malaysia Limitation Act 1953 correctly, in our view, said:

> This court is of the considered view that the period of limitation statutorily prescribed has to be strictly adhered to and cannot be relaxed or departed on the ground of equitable consideration. The provisions of s. 6(1)(a) of the said Act are mandatory in nature. This court has no discretion or inherent powers to condone the delay if the action is filed beyond the prescribed statutory period unless the matter is covered by any of the exceptions which is not the case in the present case. Therefore, this court has not only the power but the duty to consider as to whether the action is time barred, and if it is found to be time barred, the court is duty bound to strike out the action.

[16] The learned trial judge however disagreed with the appellant. In holding that limitation had not set in against the respondent, His Lordship took the view that the applicable item was item 112 and not item 95. Item 112 provides for a limitation period of 12 years for possession of immovable property or any interest therein not otherwise specially provided for under the Schedule. If this item applies, the respondent's claims would be well within time.

[17] Under this item, time begins to run when the possession of the defendant becomes adverse to the plaintiff. This was how the learned judge dealt with the matter:

> [12] The ultimate relief of the plaintiff in this action is to have the said land registered in its name especially when it had fulfilled its obligation under the said Sale and Purchase agreement. It is obvious that the plaintiff is praying for certain declaration on the validity and enforceability of the Sale and Purchase agreement dated 19.2.2004 as well certain declaration on the validity of the sublease agreement dated 5.7.2005. They do not pray for damages for breach of contract against the defendant.
>
> [13] Hence it is obvious that item 95 (as pleaded by the defendant) is not applicable to the plaintiff's case. In my opinion the plaintiff's case falls under item 112 of the Limitation Ordinance which provides that the limitation period for the possession of immovable property not otherwise provided for by the Ordinance is 12 years from the time when possession of the defendant become adverse to the plaintiff.

[18] In so deciding, the learned judge relied on the following passage in the judgment delivered by Gill FCJ (Ong CJ (Malaya) and Ali FCJ concurring) in the Federal Court case of *Nasri v. Mesah* [1970] 1 LNS 85; [1971] 1 MLJ 32:

> In the present action the plaintiff's prayer was for an order that the defendant do execute a valid and registrable transfer of the land. In other words, he was asking for specific performance of the agreement as in *Ng Moh*'s case [1971] 1 MLJ 32. But what in effect he was seeking to do was to obtain the land by a judgment of the court. It follows, therefore, that whether the action is for specific performance of an agreement for the sale of land or for a declaration of title to land, it is essentially an action to recover land, so that the period of limitation would be 12 years in either case.

[19] The Federal Court in that case was dealing with s. 9(1) of the repealed Federation of Malaya Limitation Ordinance 1953 which reads:

> 9(1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.

[20] We note that this Ordinance does not contain any provision that is even close to item 112 of the Schedule to the Limitation Ordinance. With due respect to the learned trial judge, we must say at the outset that his reliance on item 112 is misconceived. Item 112 is only applicable to a claim for adverse possession: See the *obiter dictum* of Ian H C Chin J in *Narinder Kaur v. Deyoh Opong & Ors* [1997] 2 CLJ 895 HC which in our opinion is a correct statement of the law. The item is not intended to cover breach and/or specific performance of a contract in writing, which is covered by items 92 and 95 of the Schedule.

[21] It is important to remember that the respondent's case was that the SPA was valid and enforceable between the parties, and that it was a term of the agreement that vacant possession of the subject land was to be delivered to the respondent upon payment of the purchase price by the appellant.

[22] On the pleadings, it is clear that the respondent's claim in Suit 86 was not for adverse possession of the subject land. Rather, the respondent's claim was for breach of the SPA and/or for specific performance of the agreement. This takes the claim outside the scope of item 112 of the Schedule.

[23] Given the respondent's pleaded case and the evidence before the court, the question of the appellant being in adverse possession of the subject land does not arise for item 112 to be applicable. The mere fact that the respondent in Suit 86 was claiming for a declaration that the SPA was valid and enforceable and that the respondent was the legal and beneficial owner of the subject land does not mean that the appellant was in adverse possession of the land.

[24] For item 112 to apply, the respondent's claim has to be for adverse possession of the subject land and not merely for a declaratory relief that it was the legal and beneficial owner of the land and that the appellant was holding the land as bare trustee pending its transfer to the respondent.

[25] *Nasri v. Mesah (supra)* is therefore irrelevant as it was a case on recovery of land and not on adverse possession of immovable property or any interest therein within the meaning of item 112 of the Schedule. It is item 92 and/or item 95 that are applicable and not item 112. Perhaps this was the reason why learned counsel for the respondent did not even refer to *Nasri v. Mesah* at the hearing of this appeal.

[26] The respondent went on to submit that the appellant was not entitled to rely on item 92 as it was not pleaded. It was pointed out that since the wrong item 95 was pleaded by the appellant, its defence of limitation could not be sustained.

[27] The appellant contended otherwise. It was argued that once the defence of limitation had been expressly pleaded, it was entitled to rely on any provision of the Limitation Ordinance to defeat the respondent's claim as the burden was on the respondent in any event to show that its claim was not caught by limitation.

[28] Our view on the matter is that the High Court is empowered to consider any item of the Schedule to the Limitation Ordinance provided limitation has been set up as a defence and the evidence warrants its determination. The learned judge would have been right to apply item 112 (although not pleaded by the respondent) had there been evidence to support its application. There was none in this case.

[29] Reference may be made to the Federal Court case of *Syarikat Kemajuan Timbermine Sdn Bhd v. Kerajaan Negeri Kelantan Darul Naim* [2015] 2 CLJ 1037 where headnote (1) to the report reads as follows:

> [1] The defence of limitation was properly and sufficiently pleaded by the defendant. Even though the Limitation Act 1953 ('LA53') was not mentioned by name in the defence, it was sufficient for the defendant to aver in the defence that the plaintiff's claim was time-barred according to law. The defendant had also not abandoned the limitation defence. The limitation issue was taken up before the High Court.

[30] In the present case, it is clear that the appellant had put the respondent to sufficient notice of its intention to rely on limitation by pleading item 95 in its statement of defence and by relying on item 92 in its opening statement, and it had not, at any stage of the hearing, abandoned the defence.

[31] The limitation period for specific performance was clearly an issue before the High Court and the respondent had every opportunity to adduce evidence to defeat the defence but chose not to do so. Instead, it chose to argue that item 95 was not applicable as it was not claiming for compensation for breach of contract.

[32] Thus, while it is true that item 92 was not pleaded by the appellant in Suit 86, its failure to plead the item does not disentitle it from relying on the item as it is clear on the agreed facts that the respondent's claim was for breach of contract and/or for specific performance, and not for adverse possession of the subject land. Facts that are agreed have the same value and weight as facts that are proved after a full trial.

[33] To reiterate, although the respondent's claim in Suit 86 was for declaratory reliefs, it was for all intents and purposes a claim for breach of the SPA and to compel its performance by the appellant, ie, by transferring the subject land to the respondent, as agreed. This is clear from the following testimony of PW1 during cross-examination:

> Q37: In essence, the claim initiated by you on behalf of the Plaintiff against the Defendant is for the Defendant to complete the Sale and Purchase Agreement ie, to transfer the land from the Defendant to the Plaintiff.
>
> A: Correct, as one of my duties as liquidator.

[34] It was PW1's testimony that the appellant was to deliver vacant possession of the subject land to the respondent upon payment of the full purchase price, which was supposed to be on 4 February 2005 when the allotment of the 6,169,000 shares was made. PW1 had further testified that in the event the appellant failed to transfer the subject land by 4 February 2005, it would be in breach of the SPA.

[35] The question whether the appellant's failure to transfer the subject land constituted a breach of the SPA was a question of law for the learned trial judge to determine (and not for any witness of fact), but PW1 was not wrong anyway to suggest that the appellant would be in breach if it did not transfer the land to the respondent by 4 February 2005.

[36] It is important to note that what is mandatorily required by the proviso to s. 3 of the Limitation Ordinance is for the defence of limitation to be set up by the defendant if he intends to rely on it, which the appellant had done in the present case.

[37] The proviso does not say that the defendant must plead the particular item or items of the Schedule that he intends to rely on. In the circumstances, we were unable to accede to the respondent's argument that since item 92 was not pleaded by the appellant, its defence of limitation could not be sustained.

[38] In our view, so long as the defence of limitation has been set up as required by the proviso to s. 3 of the Limitation Ordinance, and the defendant's reliance on any item of the Schedule is supported by the evidence, the court is under a duty to consider the defence although not pleaded. As decided by the Federal Court in *Syarikat Kemajuan Timbermine (supra)*, it was sufficient for the defendant to aver in the defence that the plaintiff's claim was time-barred according to law.

[39] In fact, in that case the defendant did not even refer to the Limitation Act 1953 in its statement of defence, yet the apex court considered the defence to be available.

[40] Therefore, by virtue of item 92 of the Schedule, the three-year limitation period for the respondent to claim for specific performance of the SPA began to run from 4 February 2005, which was the date when the appellant allegedly breached the SPA by failing to transfer the land to the respondent as agreed.

[41] By the time the respondent filed Suit 86 and Suit 113 in October 2015, it was clearly out of time. Its claims should therefore have been dismissed by the learned trial judge by virtue of s. 3 of the Limitation Ordinance.

[42] It was for all the reasons aforesaid that we allowed the appellant's appeal with costs, subject to payment of the allocator fee. The order of the High Court was set aside. The deposit was refunded to the appellant.